IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17470 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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RAMANBHAI KANTIBHAI WAGHELA

Versus

STATE OF GUJARAT

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Appearance:

1. Special Civil Application No. 17470 of 2003

Ms. Shaheen Qureshi for MR MM TIRMIZI for Petitioner No. 1

Ms P B Sheth, AGP for Respondent No. 1-3

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CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 22/03/2004

ORAL JUDGEMENT

The petitioner-detenu has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and

setting aside an order dated 1.10.1003 passed by respondent No. 2 herein under section 3(2) of the Gujarat Prevention of Anti-social Activities At, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. On going through the detention order dated 1.10.2003 placed at page no.14, Annexure 'A', it is found that five offences have been registered against the petitioner during the period from 21.2.2003 to 15.9.2003. They all related to the offences punishable under section Section 66 (b), 65 (E), 65 (F), 66(1) (b) read with section 81 of Bombay Prohibition Act, before South Gujarat Prohibition Police Station, Vadodara being CR No.60/2003, Varanama police station CR No.150/2003, Padra police station C.R. No.306/2003, Padra police station C.R. No.392/2003 and Padra police station C.R. No.919/2003 on 8.1.003, 2.5.2003, 17.2.2003, 19.3.2003 and 17.8.2003 respectively. All offences are related to the possession of illicit liquor etc. The detaining authority has also considered two statements of unnamed witnesses in support of the order of detention. On the aforesaid strength of material, the impugned order of detention was passed against the detenu.

3. The impugned order of detention has been challenged on various grounds. Learned Advocate for the petitioner has contended that the detaining authority has suppressed names of the unnamed witnesses exercising powers under section 9(2) of the said Act. However, there is no credible material on record to support the said exercise of power. That the petitioner could not be treated to be bootlegger. That therefore, the detention order be quashed and set aside.

4. On receiving the petition, rule was issued and Ms. P B Sheth, learned AGP appears on behalf of the respondents. I have heard the learned Advocates for the parties and have perused the papers. Learned Advocate for the petitioner has argued that the detaining authority has considered the statements of two unnamed witnesses recorded by the concerned police officer and verified by the detaining authority. She also contends that names of these witnesses were not disclosed but the power of privilege under section 9(2) of the Act has been claimed by the detaining authority. She has also contended that there was no material on record to show that the said power of privilege was rightly exercised by respondent no.2.

5. Now on going through the record, it is found that there is no affidavit in support of the detention order to show that there was justification on the part of the detaining authority to pass the order of detention. It is well settled that if power is to be exercised as privilege under section 9(2) of the Act, there must be credible material to enable the detaining authority to come to a conclusion that this is a fit case wherein the said privilege is required to be exercised. Looking to the records and looking to the absence of affidavit, it would not be possible for this court to hold that there was credible material before the second respondent for exercising such power of privilege under section 9(2). Ordinarily, in order to follow the principles of natural justice, names of witnesses are required to be disclosed. By way of exception, provision of section 9(2) has been made which would enable the authority to keep the names of the witnesses away from the detenu with a view to look at the safeguards of the witnesses. However, for the purpose of claiming the said privilege under section 9(2) of the Act, it would be necessary to indicate that there was credible material to record a finding, that the said privilege is required to be claimed. The above material did not indicate that there was such material before the detaining authority enabling him to record his finding that privilege under section 9(2) of the Act is required to be claimed. Therefore the names of the witnesses could not have been withheld and once they are withheld without any justification, then the detention order passed by the second respondent cannot be sustained in the eye of law as the petitioner would be deprived of a constitutional remedy under Article 22(5) of the Constitution of India of making an effective representation against his detention order.

6. It has also been pointed out that the second respondent passed the order of detention dated 1.10.2003. The representation was received by him from the son-in-law of the petitioner on 27.11.2003. Since by that time the State Government had already approved the detention of the detenu, the detaining authority was not in a position to deal with and decide the said representation. Therefore, as a matter of practice, the second respondent had sent his reply on 4.12.2003. This cannot be treated to be proper procedure for dealing with and deciding the representation of the detenu. The said communication submitted by the learned Advocate is taken on record.

7. The petitioner had also claimed disclosure of the said names in the said representation. The second

respondent has given a reply that the names were required to be kept away from the petitioner. However, there also the grounds for claiming privilege are not present which is required to be noted.

8. Learned AGP has contended that by representation dated 27.11.2003, Annexure 'C' at page 29, the petitioner simply claimed disclosure of the unnamed witnesses. This cannot be taken to be the correct position on record. It is true that the petitioner had requested the detaining authority to supply names of those witnesses. At the same time, it has also been stated in the representation that the detention order is illegal and the same be quashed and set aside. This aspect necessarily touches the merit of the detention order and, therefore, it was required to be dealt with by appropriate authority. As stated above, as soon as the representation was submitted after the detention order was approved by the State Government, the detaining authority could not deal with and decide the same and, therefore, as per the settled practice, he could have and should have forwarded it to the appropriate authority for dealing with and deciding the issue of detention after the approval of the detention order by the State Government. This has not been done and, therefore, the valuable right of the petitioner to submit his representation under Article 22 (5) of the Constitution of India has been adversely affected. The right under Article 22(5) of the Constitution of India is not a mere paper right of a detenu to submit representation. His right is a substantive right to receive a decision taken on merit. When the petitioner's representation dated 27.11.2003 was not decided by the appropriate authority, then the said right can be said to have been defeated and in that matter further detention of the petitioner could not be sustained in the eye of law.

9. So far as the right to representation under Article 22 (5) is concerned, the Division Bench of this Court in the case of Harijan Govind Jadav v.State of Gujarat, reported in 1987 (1) GLR 216 has clearly observed that a decision on such a representation is not a mere formality. Even with respect to privilege under section 9(2) of the said Act, this court has dealt with such a situation in the case of Ranubhai B Bharwad v. State of Gujarat reported in 2000 (3) GLR 2696 wherein also it has been laid down that while claiming privilege under section 9(2) of the said Act, proper procedure is required to be followed and there has to be subjective satisfaction on the part of the detaining authority with respect to the existence of the situation for claiming

such a privilege. In above view of the matter, it is found that it cannot be said that privilege under section 9(2) of the Act was properly claimed and justification for claiming the same is absent. On the other hand, the representation of the petitioner on the merit of the detention order was not considered by the authority which was required to be considered and it has been considered by the second respondent after passing the detention order. As per the said practice, he had to forward it to the appropriate authority. It has not been done. In above view of the matter, further detention of the petitioner could not be sustained. Consequently, the detention order is required to be held to be illegal and, therefore, the petitioner is required to be released from detention.

10. For the foregoing reasons, this petition is allowed. The impugned order dated 1.10.2003 passed by respondent No.2 in exercise of powers under section 3(2) of the PASA Act detaining the present petitioner, is ordered to be set aside. Detenu-Ramanbhai Kantibhai Vaghela is ordered to be set at liberty forwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp